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CAUSE NO. PD-0059-20

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TO THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

JAMES BERKELEY HARBIN, II,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

APPEAL FROM DALLAS COUNTY

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

CAUSE NO. 05-18-00098-CR

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APPELLANT'S BRIEF ON THE MERITS

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TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

COMES NOW James Berkeley Harbin, II, appellant herein, and respectfully submits this his Brief on the Merits and would show the Court as follows:

STATEMENT REGARDING ORAL ARGUMENT

Appellant agrees with the State that oral argument is not necessary in this case.

STATEMENT OF THE CASE

The State has correctly presented the history of this case including the original conviction, habeas relief granted, and subsequent punishment hearing and sentence. The State also correctly notes, including by appendix, that the court of appeals held that appellant's sole complaint on appeal about charge error was meritorious and the error was harmful. The State also explains that the State's Motion for Rehearing was denied but does not inform the Court that the motion was denied because the State had forfeited the defensive position presented in the Motion because that position had not been presented in the State's original brief.

SUMMARY OF THE ARGUMENT

The mitigating issues of "adequate cause" and "sudden passion" were not considered by the jury at his first trial because they were contained in a lesser included offense instruction when the jury found him guilty of the greater offense. The change in the law requiring the jury to consider these issues in the punishment phase of the trial when such were raised by the evidence should be held retroactive to allow the jury at the re-trial to consider a wider range of sentencing possibilities

The state forfeited the right to complain about an appellate defensive position when such was not raised on initial appeal but only on Motion for Rehearing.

ARGUMENT

I.

THE CHANGE IN THE LAW MAKING THE MITIGATING ISSUES OF "SUDDEN PASSION" AND "ADEQUATE CAUSE" SUBMITED TO THE JURY DURING THE PUNISHMENT PHASE OF THE TRIAL RATHER THAN AT THE GUILT STAGE SHOULD BE APPLIED RETROACTIVELY

Famed political theorist, commentator, author, and journalist William F. Buckley Jr. once stated that I will win every argument if I am allowed to make the first assumption. Such is rhetoric in its highest form: language designed to have a persuasive or impressive effect on its audience but often is regarded as lacking in

sincerity or meaningful content. The state has engaged in such rhetoric in the pending cause.

At time of appellant's offense and initial trial, the Penal Code contained two separate but related offenses: the offense of murder, a first degree felony offense and the offense of voluntary manslaughter, a second degree felony offense. Voluntary manslaughter under some circumstances, depending on the evidence presented, was considered to be a lesser included offense. *Nobles v. State*, 843 S.W. 2d 503, 511 (Tex. Crim. App. 1992). If raised by the evidence, the issue of voluntary manslaughter was submitted to the jury in the instructions at the guilt phase of the trial. The guilt/innocence instructions in appellant trial authorized the jury to find appellant guilty of either offense. Appellant was found guilty of murder. From this conclusion, the state writes, rhetorically, that therefore the jury rejected the submission of voluntary manslaughter as basis of finding appellant guilty. State's Brief, p. 5, footnote 2. This statement is both untrue and misleading.

The statement is not an accurate statement of the law applicable at the time of appellant's first trial. When the jury was instructed on both the offense charged and the lesser included offense, they were instructed that the jury could not find the appellant guilty of the offense charged only if they believed he had committed that offense and that only if they had a reasonable doubt as to whether he was guilty of

that offense should they consider whether he was guilty of the lesser included offense. *Smith v.* State, 744 S.W. 2d 86, 94-95 (Tex. Crim. App. 1987); *Boyett v. State*, 692 S.W. 2d 512, 515-16 (Tex. Crim. App. 1985); *Cobarrubio v. State*, 675 S.W. 2d 749, 751-52 (Tex. Crim. App. 1983).

Thus the state's reference that the jury rejected the mitigating evidence of "sudden passion" and "adequate cause" is an incorrect statement of the law. The determination by the jury that the state had proven beyond a reasonable doubt that appellant had committed the offense of murder in fact precluded the jury from considering whether he had committed the offense of voluntary manslaughter. The state's reference that the jury had rejected this mitigating evidence is misleading because, under the structure of the instructions given to the jury, the jury never did, in fact, consider these mitigating factors.

The state is, however, correct in stating the general rule about retroactively applying the law. That is, when there is a change in the law in the time between the commission of an offense and the time of trial, or if there is a change in the law between the time of the commission of the offense and a retrial after a reversal and remand for trial, the law in effect at the time of commission of the offense applies and any changes in the law will not be applied retroactively. But there are exceptions, rare exceptions, to this general rule.

In *Miller v. Alabama*, —U.S. —, 132 S.Ct. 2455, 2469, 183 L.Ed. 2d 497 (2012) the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The Court held that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id*. at 2462. After this decision many courts across the country struggled with the issue of whether the *Miller* holding would apply retroactively to post-conviction proceedings.

This was a question of concern in Texas. For a time, a person convicted of Capital Murder when the state did not seek the death penalty the only possible sentence was confinement for life without the possibility of parole. Then came *Miller* followed by a subsequent change in Texas law that when the state did not seek the death penalty, and the defendant was younger than eighteen when the offense was committed, the defendant was sentenced to confinement for life with the possibility of parole.

This Honorable Court was confronted with the issue of retroactivity when the defendant was initial convicted under the former capital murder law but raised the constitutional challenge presented by the *Miller* ruling. This Court determined that the *Miller* rule would be retroactively applied allowing submission to the jury for

further sentencing proceedings that would allow the fact finder to assess the offender's sentence at life with the possibility of parole even though such was not the law when the defendant committed the offense. *Ex parte Maxwell*, 424 S.W. 3d 66, 75 -76 (Tex. Crim. App. 2014). The *Miller* rule was held to be retroactive because under that decision the fact finder at the new punishment hearing was presented with a wider range of sentencing alternatives. It has even been held that the defendant does not forfeit his right to have, in capital murder cases, the jury consider a sentence of life with parole availability even though he did not lodge a timely objection at the time of trial and the statutory scheme did not provide for such a sentencing alternative. See *Garza v. State*, 435 S.W. 3d 258, 261 (Tex. Crim. App. 2014).

The *Miller* rule was held to be applied retroactively because it allowed the jury to consider the mitigating factor of youth in the assessment of sentence when such was not allowed under the law that existed at the time of trial. In the instant case, the statutory structure in place at the time of appellant's initial trial did not permit the jury to consider the mitigating factors of "sudden passion" and "adequate cause" unless they first "acquitted" the accused of murder. Because under the change of the law in appellant's situation, making "sudden passion" and "adequate cause" issues presented at the sentencing hearing rather than issues during the guilt/innocence phase of the trial, such should be applied retroactively because it similarly allows the jury to

consider mitigating factors not otherwise placed under consideration by the jury.

II.

THE STATE FORFEITED THE RIGHT TO ARGUE A DEFENSIVE POSITION NOT PRESENTED IN THE BRIEF FILED PRIOR TO THE RENDERING OF THE DECISION OF THE COURT OF APPEALS

On initial appeal appellant presented a single issue for review by the court of appeals:

> **THE DISTRICT COURT COMMITTED ERROR IN OVERRULING APPELLANT'S OBJECTION TO THE OMISSION OF A MITIGATION INSTRUCTION**

The State responded with the following defensive positions in alternative arguments:

> **Appellant failed to preserve this issue for appellate review. In the alternative, the trial court did not err in overruling Appellant's request for a sudden-passion jury instruction. Moreover, Appellant was not harmed by any error.**

It was not until after the court of appeals decision was delivered that the State's Motion for Rehearing raised the following defensive position:

> **This Court (of Appeals) erred by determining that the trial court erred in refusing to include a sudden-passion instruction in the jury charge at Appellant's 2017 retrial on punishment for a murder he committed in 1990 because the savings provision in the 1993 Act amending the penal code provides that it was not the**

law applicable to the case.

In the State's Motion for Rehearing the State made the following concession:

> **[N]either Appellant nor the State raised the argument in their briefs on direct appeal, under the savings provision applicable to the 1994 amendment to section 19.02 of the penal code, sudden-passion was not the law applicable to the case, regardless of whether the change in the law was procedural or substantive.**
> State's Motion for Rehearing, at p. 1-2.

The State's Motion for Rehearing was overruled by the court of appeals on December 18, 2019 with citation to a single case supporting the ruling: *Rochelle v. State.*

The State's Petition for Discretionary Review does not complain that the court of appeals incorrectly ruled against the State's defensive positions raised on initial submission of the briefs of the parties. Rather, the State complains in its petition that the court of appeals' decision was erroneous on the defensive position taken by the State in its Motion for Rehearing. The State does not address the issue that the argument made therein was never addressed by the court of appeals and is not part of the decision for which the State seeks review by this Court.

This Honorable Court has repeatedly and consistently held that a petition for discretionary review should specifically address only error(s) in the court of appeals' holding. *Gregory v. State*, 176 S.W.3d 826, 827 - 28 (Tex. Crim. App. 2005); *Degrate v. State*, 712 S.W.2d 755 (Tex. Crim. App.1986) (per curiam); *State v. Consaul*, 982

S.W.2d 899, 902 (Tex. Crim. App.1998) (Price, J., concurring) ("This court's jurisdiction is limited to review of decisions by the courts of appeals."); *King v. State*, 125 S.W.3d 517, 518 (Tex. Crim. App. 2003) (Cochran, J., concurring statement) (citing *Degrate*, 712 S.W.2d at 756). Historically this Honorable Court will refuse a petition for discretionary review that does not directly attack the holding of the court of appeals. *Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App.1995).

It is appellant's position that the State has failed to preserve the merits of the defensive position presented for the first time in its Motion for Rehearing. This argument has not been presented to the court of appeals and has not been addressed by the court of appeals. Such is not a proper matter for discretionary review The State's complaint raised at this stage of the proceedings comes too late. *Rochelle v. State*, 791 S.W.2d 121 (Tex. Crim. App.1990); *Farrell v. State*, 864 S.W.2d 501 (Tex. Crim. App.1993). Nothing prevented the State from raising the defensive position presented in its Motion for Rehearing in its brief on original submission. The Court of Criminal Appeals only reviews "decisions" of the courts of appeals; this Court does not reach the merits of any party's contention when it has not been addressed by the lower appellate court. *Lee v. State*, 791 S.W.2d 141 (Tex. Crim. App.1991).

A court of appeals is not required to entertain a State's contention for the first time in a motion for rehearing. If the court of appeals does not entertain the

contention made in a motion for rehearing, the Court of Criminal Appeals has no "decision" to review. *Sotelo*, 913 S.W.2d at 508 - 09. The State's Petition for Discretionary does not even posit an argument as to why this Court should grant review of a matter not presented to or decided by the court of appeals.

PRAYER FOR RELIEF

WHEREFORE, FOR THE FOREGOING REASONS, the State's Petition for Discretionary should be denied and the case remanded to the trial court for a new sentencing hearing.

Respectfully Submitted,

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, in compliance with **TEX. R. APP. PROC. 9.4 (I) (B) (2)** that this document contains 2141 words, including all contents except for the sections of the brief permitted to be excluded by **TEX. R. APP. PROC. 9.4 (I) (1).**

/S/ Lawrence B. Mitchell
LAWRENCE B. MITCHELL

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing reply brief has been served on April 29, 2020 via e-mail or certified electronic service provider to:

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/S/ Lawrence B. Mitchell
LAWRENCE B. MITCHELL

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